APPENDIX A

OPINION BELOW ON FIRST APPEAL, 333 F.2d 202

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9136.

THE DANVILLE TOBACCO ASSOCIATION, a corporation, et al.,
Appellees,

versus

BRYANT-BUCKNER ASSOCIATES, INC.,
Appellant,

and

THE DANVILLE TOBACCO ASSOCIATION, a corporation, et al.,
Appellees,

versus

PRODUCERS TOBACCO COMPANY, INCORPORATED,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.
TED DALTON, DISTRICT JUDGE.

(Argued January 14, 1964. Decided May 14, 1964.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

Frederick Bernays Wiener (I. Murchison Biggs and Robert F. Ward on brief) for Appellant Bryant-Buckner Associates, Inc.; G. Kenneth Miller (Earle Garrett and Allan Garrett on brief) for Appellant Producers Tobacco Company, Incorporated; Edwin B. Meade (Meade, Tate and Meade on brief) for Appellees; and John W. Carter and C. Stuart Wheatley (Talbott, Wheatley & Talbott; and Carter and Carter on brief) for W. Townes Lea and Louis W. Love, Partners Trading as Piedmont Warehouse and Hughes Warehouse, and Neal's Warehouses, Incorporated.

ALBERT V. BRYAN, Circuit Judge:

Bright leaf tobacco sales at public aution are conducted in the Danville, Virginia marketing area in warehouses operated by members of the Danville Tobacco Association (Association) which brought this action in the District Court seeking a declaratory judgment upon the validity, apposed the Federal antitrust statutes, of its plan for allotting selling time during the 1962 season among the warehousemen. The defendants were members of the Association. The plan was stricken down as illegal on the opposition of two of the defndants, but this appeal is prosecuted by them to further decrees declaring valid a temporary assignment plan for 1962 and 1963 and a permanent plan for subsequent seasons.

Appellant Bryant-Buckner Associates, Inc. (B-B) contends that these determinations were irregularly reached, that the plans were violative of the antitrust laws in that they permitted an unreasonable restraint of trade, and that the District Court exceeded its authority by ruling upon the general fairness of the plans in advance of their enforcement. Producers Tobacco Co., Inc. (Producers) appeals on the ground that the plans do not provide adequate protection against improper tactics of members and do not give a member credit for past performance.

We affirm the District Court insofar as it concluded that the temporary 1962-1963 plan did not embrace any breach of the antitrust statutes. We suspend provisionally the order establishing the permanent plan, and remand the action with directions to the District Court to seek the advice of the Federal Trade Commission upon the validity and administration of the permanent plan. While procedures in the District Court departed from the conventional course, no injustice resulted. However, except upon the antitrust phase, we think the District Court should not have ruled upon the plans prior to their application. Nevertheless, as the plans for 1962 and 1963 have been executed without contravening the antitrust laws, we have no occasion to review their general fairness.

The production and sale of tobacco since colonial times has been impressed with a public interest and subject to governmental control. Hening's Statutes at Large, A Collection of all the Laws of Virginia, Vol. IV, Chap. VII, p. 91 (1720) and Vol. IX, Chap. X, p. 482 (1778); 1951-52 Virginia Cavalcade, Vol. 1, No. 1, p. 39, *Some Called It Treason* by William H. Gaines, Jr. (Virginia tobacco planters in spring of 1682 rebelled in an effort to gain crop control). Moreover, the nature of flue cured bright tobacco, together with other economic factors, has also made it imperative that sales be regulated.* Tobacco in Southeast United States is grown in geographical belts. It ripens first in the southernmost of them and, of course, each year's marketing commences there. This process progresses northwardly by seasons until the fifth and last belt, including Virginia, is reached in September.

---

* For more instructive accounts of the preparation and sale of Tobacco, see American Federation of Tobacco Growers v. Neal, 183 F. 2d 869 (4 Cir. 1950); Rogers v. Douglass Tobacco Board of Trade, 244 F. 2d 471, 473 n.3 (5 Cir. 1957), 266 F. 2d 636, *cert. denied*, 361 U.S. 833 (1959); and report of the master in the present case.

As the growers bring their tobacco to warehouses for sale, the warehousemen have found it wise to prescribe uniform rules for governance of the sales. To this end, they founded an organization known as the Bright Belt Warehouse Association. It does not prescribe local rules for any market but deals solely with general directions relating to the ascertainment of the harvest periods for each belt, the hours of sale, the number of buyers and the quantity of tobacco to be sold daily. The propriety and legality of these regulations are not in dispute, the character of the business admittedly necessitating them.

The Bright Belt Warehouse Association has declared that no more than 400 baskets of tobacco should be sold per hour and that daily sales be confined to 5½ hours. These limitations are compelled by the inability of a buyer to bid intelligently upon a greater quantity or for a longer period. Thus for one day the sales would be restricted to 2200 baskets (400 x 5½). Four buyers, assigned to the Danville market by each major tobacco company, permit four auction sales to be conducted contemporaneously, so that a maximum of 8800 baskets (4 x 2200) can be sold daily.

With the supply of tobacco about constant and sales hours and buyers defined, the question arises how each day's selling time shall be prorated among the warehouses. This problem germinates from the obligation to avoid loss to the producers through failure to sell all the tobacco they have brought to the market on a given day. When auctioned the tobacco has been cured, dried and moistened. Once taken from the pack house for sale, it will easily crumble and spoil unless soon redried. Obviously, no more should be offered than can be dried off within the stipulated period.

For some years previous to 1962 the selling time permissible at Danville had been divided among the warehousemen on the basis of the ratio of the floor space of their respective warehouses to the total market floor space. This system had serious defects, but none more menacing than

the increase of floor space not to meet a need but to enlarge a warehouse's proportion of selling time. Continued uneconomic overbuilding as well as the general advantage of cooperation among the warehousemen, farmers and buyers brought about The Danville Tobacco Association, plaintiff-appellee.

The General Assembly of Virginia chartered the Association by a special act on March 8, 1888, as a non-stock, non-profit corporation, its membership to consist of warehousemen, buyers and rehandlers of leaf tobacco. It was created "for the purpose of encouraging, promoting and regulating the sale of leaf tobacco and trade therein in the town of Danville, Virginia, so far as the same may be done under and in accordance with the laws of this commonwealth." The corporation was authorized "to make all necessary rules and by-laws as a majority of its members may deem proper for the promotion of its objects and the purposes of its incorporation."

In early February 1962, B-B joined the Association. Its warehouse, together with a new one constructed by an existing member, raised the total to 17 on the Danville market. Newspapers had announced that B-B would request an apportionment of time on the basis of approximately 165,000 sq. ft. At the next annual meeting of the Association, February 20, 1962, after a discussion on the disruption of allocations by additional warehouses, the gathering was adjourned until March 12, 1962. The governing board was directed in the interim to "consider a plan for an equitable method of allotting settling time on this market, designed to avert the building of excess floor space presently or in the future."

At the adjourned meeting a proposal for a floor space allocation was offered and adopted; only B-B and another dissented. The new resolution so far as pertinent recited and provided as follows:

> "WHEREAS, the existing warehouse space in Danville is eight times that needed to sell the average

crop on this market and it is deemed essential at this time that some fair and reasonable means be followed which will reasonably regulate the construction of additional excess warehouse space by member owners of warehousemen and those who may build new warehouses and who may apply for membership in the Association and an allotment of selling times on the Danville market;

* * *

"Now, Therefore, Be It Resolved . . . as follows:

ARTICLE I

"(a) For the selling season of 1962 each owner or operator of a warehouse on the Danville market shall be allotted the same selling time or basket space allotted to his warehouse during the 1961 selling season, subject to such adjustment as may be required under Article II hereof. This basis of selling time shall continue in the future as the owners or operators of warehouses during the selling season of 1962, subject only to adjustments required aforesaid.

* * *

ARTICLE II

* * *

"(b) A *new warehouse member of the Association who has constructed a new warehouse* and *an old warehouse member who has constructed a new warehouse* or a new addition to an existing warehouse shall be considered alike in the allotment of selling time or basket space to such new construction.

* * *

"(c) Said *new warehouse member* or said old warehouse member who shall apply for an allotment of selling time or basket space for his new construction shall receive that *fractional part of the over-all selling*

time on the Danville market *as the square footage of such new construction may bear to the total square footage* of all warehouse floor space including such new construction on the Danville market, *but only forty (40%) per cent of such new allotment may be used by the owner or operator of such new construction during the first season of said allotment.* Thereafter said owner or operator of new construction shall be allowed for *each successive selling season an additional fifteen (15%) per cent of his allotted time during each successive selling season for a total of four (4) seasons,* and thereafter the full allotment made to him prior to his first selling season will continue, subject to such adjustments as may be required to allow selling time to owners or operators of subsequent new construction on the Danville market." (Accent added.)

All of the old concerns, except the one which had added a new warehouse, sought selling time on the basis of their 1961 share. B-B filed a written application for 420,000 sq. ft., more than one-third of the existing market floor space. Acknowledging its original request was for only 165,000, B-B explained the expansion was attributable to the 40% reduction for new construction made by the recent regulation. It also informed the Association of its intention to litigate the validity of the limitation. B-B later enlarged the application to 500,000 sq. ft., posting a cashier's check of $10,000.00 by way of a performance bond.

On the day the Association adopted the resolution it filed the complaint in this case. B-B answered seeking a counter declaration to the effect that the new regulation violated the antitrust laws. Appellant Producers lodged an answer, counterclaim and crossclaim, denying the reasonableness of the regulation, asserting that any apportionment based on floor space was unjust, and praying the Court to promulgate a plan for the Association which would be a fair division

of selling time. At the trial in May 1962, the Court gave every party an opportunity to be heard on the validity of the resolution and upon the general question of what would constitute a lawful program for sharing the selling time.

On June 16, 1962 the Court handed down its findings of fact, conclusions and order. It declared the resolution of the Association adopted in its March 12, 1962 meeting "not in accordance with the law and . . . unfair and unreasonable". However, the motion of B-B for the Court to proceed no further than the declaration of the resolution's invalidity —that it completely fulfilled the purpose of the suit—was denied. Instead, the Court outlined an acceptable plan for 1962.

The order portioned out the selling time by this formula: the entire warehouse floor space of the 1961 Danville market, comprising 1,400,450 sq. ft., was divided by the number of warehouses, then 16, reaching an average size of 87,527 sq. ft. This became the unit of space. With the addition of 140,000 sq. ft. added by the old member and 268,792 asked by B-B the total became 1,809,242. Division of this new total by the unit of 87,527 gave approximately 21 units. This meant that each unit carried with it 419 baskets (8800 divided by 21).

Following substantially a schedule proposed by appellant Producers, a new entrant was awarded credit in full (419 baskets) for the first unit, 50% thereof for the second unit, and 25% for the third unit. B-B had contended it was bound by a construction contract to build a warehouse of 268,792 sq. ft. Later this claim was reduced to 165,000, the Court believing this area adequate in view of the fact that 400,000 sq. ft. had been quoted as sufficient to accommodate the entire market sales. This was done with the consent of B-B. However, in applying the formula the larger floorage was used.

With 268,792 sq. ft., B-B was allowed a full credit or 419 baskets on the first unit of 87,527 sq. ft., 210 on the

second, and 105 on the third, an aggregate of 734. Slight adjustments resulted in a final figure of 724. After deduction of this number and the disallowance of an additional quota asked by the old member on the basis of its new construction, the remainder of the basket-maximum was distributed on the floor space percentages of 1961.

The order of June 16 also called a meeting of the Association on June 27, 1962 "for the purpose of considering and acting on the allotment of selling time made in this decree". On that occasion the quotients projected by the order were adopted by the Association as its own for 1962.

Meanwhile, on May 12, 1962, the Court appointed a master "to report to the court upon findings of fact and conclusion as to the issues presented herein, and particularly a formula for the allotment of selling time for the tobacco warehouses in the Danville area for 1963 and succeeding years". This order was passed with "all parties represented by counsel agreeing thereto". It was understood that the master would not consider a project for 1962. No evidence was taken by him; indeed, no evidence was received by the Court after the decree of June 16, 1962. In consequence, the master was left to draw his report from the proceedings culminating in the June decree, all of which he attended.

After discussing the modus operandi of tobacco marketing and the operations at Danville, in late 1962 the master recommended for 1963 and subsequent years the well-known and approved experience or performance plan with modifications. Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 506 (4 Cir. 1959); Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471, 478 (5 Cir. 1957). This, too, had been sponsored by appellant Producers. Under the modified version of this theory the grant of selling time is gauged for each year upon the ratio of the respective sales of the warehousemen in the preceding year to the total sales, with a proviso that a change in

selling time of a warehouse will not vary beyond a certain percentage of its selling time in the preceding year. Some reduction is introduced in giving time to a new warehouseman.

By a supplemental report the master advised that application of the experience system be delayed until the 1964 season. His reason was that as the warehousemen had not known in 1962 that their performance would bear upon the 1963 distribution, the use of the 1962 experience would not be a fair foundation for the 1963 distribution. He thought it would be fairer to look to the 1963 experience for the first measurement. Accordingly, he suggested that the temporary plan of 1962 be carried into 1963.

The report as supplemented was confirmed by the Court on January 30, 1963. A meeting of the Association was called by the order to consider the permanent plan approved by the Court for 1964 and the following years. Adoption of it as the Association's was voted. In turn the Court on March 16, 1963 ratified the action of the Association.

I. The decree of June 16, 1962 answered the primary prayer of the complaint, that is for an adjudication upon the validity of the Association's resolution of March 12, 1962 which cut the share of newcomers to 40% of average space for the first year. It found the resolution unreasonable and unfair, and thus incompatible with antitrust proscriptions. No exception or appeal was taken to that portion of the order.

The Association had refrained from enforcing the resolution until its legality was adjudicated. Hence it never became a restraint upon trade. Actually, it was no more than the publication of a by-law passed subject to review by the Court. We hold the adoption of the resolution was not a breach of the antitrust enactments.

II. Doubtlessly, the "such other further and general relief prayer" of the complaint warranted the District

Court in retaining the cause, to plan for the 1962 season, at the instance of the Association and its members, although B-B later withdrew assent. We do not disapprove the denial of B-B's motion to terminate the suit immediately upon annulment of the resolution of March 12, 1962. No matter how circuitously, in the end the Association did adopt and submit the 1962 plan to the Court. The inquiry of the Court, nevertheless, should more advisedly have been limited exclusively to the issue of whether the plan transgressed the Federal acts.

To begin with, that was the aim of the suit. Moreover, the District Court was not equipped to formulate or adjust a future conception of this sort. It could not readily project a general scheme and direct its operation; it is geared to make adjudications on points as they arise from a practiced design. Instantly, the 1962-1963 and permanent plans were matters essentially within the internal economy of the Association. They should have been written or erected initially under its own procedures with guidance, if need be, from an appropriate and expert administrative agency. At best, after determining ex facie the legality of a submitted method, the Court ought only to retain jurisdiction for solution of such antitrust or related, germane and pendent questions as might arise in its implementation.

Nor do we have facilities for framing a selling time system, or for determining whether it is generally equitable or how it should be reformed to make it fair. However, as the 1962-1963 plan has already been acted upon, no order at this time could rescind or otherwise affect those acts. We can only express a judgment upon the right or wrong of the District Judge's decision on the legal theme of the petition: whether the 1962-1963 plan as drawn and effectuated was free of antitrust taint. We do not hold he was wrong.

The facts we have chronicled comprise the findings of the District Judge together with such other facts as are

relevant and uncontroverted. Indeed there is little factual conflict. B-B's allotment of 724 baskets is not without support. Dividends of selling time in a tobacco market, it is conceded, cannot be set apart with precision.

B-B attacks the fairness of its allotment in comparison with the share of baskets it would have received under the floor space plan prevailing in early 1962 when it joined the Association. In this it avers that the total floor space in consideration was then about 1,705,000; B-B's claim for 165,000 was approximately 9.6758% of the whole; and the same percentage of the maximum 8800 baskets is 851. In getting 724 instead of 851, B-B complains it is reduced to 85% of its entitlement under the pre-March 1962 rules.

A reduction of 127 baskets, (851 less 724) or 14.93%, has not been proved to be an unreasonable restraint for a new entry in the market. Experts for both sides recognize the rightfulness of a diminution of a newcomer. The record warrants the conclusion that a just tolerance would permit a decrease of his share initially to the formula followed in this case, to-wit, a full quota for the first unit, 50% for the second and 25% for the third. This court has sanctioned a less-than-average time allowance to a fresh entrant. Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 511 (4 Cir. 1959); Asheville Tobacco Board of Trade, Inc. v. FTC, 294 F.2d 619, 625 (4 Cir. 1961). It must be remembered that this plant was only transitory, giving adequate time for preparation of a permanent arrangement.

Our agreement with the District Judge that the temporary plan is innocent of antitrust guilt is placed on the statute's terms. No unjust combination, conspiracy or monopoly is discernible. Rather, there was a bona fide and diligent effort to permit fair and just trading on the Danville Tobacco Market. The Association was in effect a board of trade seeking an equitable adjustment among the warehousemen of the constants of supply, selling time and buyers, all of which had been lawfully fixed. American

Federation of Tobacco Growers v. Neal, 183 F.2d 869, 870 (4 Cir. 1950). All of its members, as the pleadings reveal, were quite sensitive to antitrust policy. The suit's very object was to tailor the Association's floor space regulation to a pattern coming within these statutes.

Of course, there was some restraint of trade, but what was done was done from unimpeachable motives and under the aegis of the District Court. This is a factor to be weighed in assaying the reasonableness of the restraint. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). In fine, we are not convinced it was excessive. Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 263 F.2d 502, 511.

III. To impeach the decrees, attack is mounted by B-B upon the ground that the master appointed by the District Court was unqualified and disqualified. The argument is utterly unsound. It wholly misconceives his place in the suit. Besides, the appointment was made with the full knowledge and consent of B-B, even to the selection of the person to be master. True, he was not a lawyer, but the Federal Rules of Civil Procedure contain no such requirement. Rule 53(a).

He was an official of the Bright Belt Warehouse Association who had testified in the case before his appointment and who testified thereafter. If B-B may object despite its contrary representation to the Court, still there was no error in his appointment and service. "Master" was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. He did not take evidence; he did not resolve any factual disputes; he made no rulings of law. Impressed with his marked knowledge in tobacco marketing, demonstrated in his testimony, the Court chose him as an expert for its guidance. He was subject to questioning as a witness before and after his counseling advice to the Court. Rightfully, and with every propriety, he expounded to the Court and the parties the techniques of the subject in suit.

It is a practice frequently resorted to in litigation, especially in patent and scientific cases. See Scott v. Spanger Bros., Inc., 298 F.2d 928, 930 (2 Cir. 1962). Incidentally, he served without compensation and even enlisted the aid, on the same basis, of a competent and disinterested attorney to help him propound his views. All of this was known to the Court and to every party, without the slightest reservation by any of them, including B-B.

The aspersions deliberately directed at the master in the briefs of B-B's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them.

IV. The permanent plan approved for 1964 and subsequent years adopted generally, as noted, the experience system. It provides for allotments on the unit basis. Each warehouse area of 87,500 sq. ft. will be considered a unit. Twenty-one (21) units have been found in the Danville market. The total selling time of 8800 baskets will be apportioned among the 21 units equally, except a new member will be awarded selling time at the rate of 75% for his first unit, 50% for his second unit and 25% for subsequent units. An 8% gain or loss limitation annually upon the selling time is included, based on the total selling time of the particular warehouse. The authorities approve a restriction of this kind when reasonable. Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 263 F.2d 502, 511; Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 294 F.2d 619, 629 (4 Cir. 1961).

Heretofore we have indicated the inaptitude of a court's machinery to prescribe and administer a prospective plan, such as that required for the operations of a tobacco market. It is a matter requiring a fluidity of procedure and an expertise not possessed by courts. Inasmuch as the Association is performing a governmental function, it seems meet

and right to seek the advice of the Federal Trade Commission in the instant controversy. That body has the procedural adaptability and a familiarity with the subject necessary to consider and adjudge the workability and legality of a plan for the Association. Accordingly, we will suspend pro tempore so much of the decree of the District Court as finally approves the permanent plan, and remand the cause with directions to the Court to refer the permanent plan forthwith to the Federal Trade Commission, requesting it to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan. See Rules of Practice, Federal Trade Commission, 16 C.F.R. § 1.11, 15 U.S.C.A., following § 45 (1963 Supp.). See United States v. R.C.A., 358 U.S. 334, 346-52 (1959); Note, 51 *Harv. L. Rev.* 1251, 1253 (1938); FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948); FTC v. Cement Institute, 333 U.S. 683, 726 (1948).

In the event the Federal Trade Commission is unable to complete its study before the commencement of the 1964 selling season, the Danville market should be permitted for that year to proceed on the basis of the permanent plan. In the circumstances and on the present record, it does not appear to us to be such an unreasonable restraint of trade as to preclude its utilization until further exploration and study of the problem can be consummated.

V. The appeal pressed by Producers poses questions of management, direction and regulation of the auction sales as well as equitableness of the plans. The first point pertains to the discipline and administration of the Association. This grievance must be submitted to the governing body of the Association before resort to the courts is in order. The general fairness of the plans, as we have observed, was an analysis not appropriate for the Court.

The orders of the District Court entered in regard to the 1962-1963 selling seasons are affirmed, the orders in

reference to the selling seasons of 1964 and subsequently are suspended and the action remanded for proceedings consistent with this opinion. The District Court should retain jurisdiction of the cause for such further orders as may become requisite in the final settlement of the controversy.

Affirmed in part and remanded with directions

APPENDIX B

OPINION BELOW ON PRESENT SECOND APPEAL

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,579.

THE DANVILLE TOBACCO ASSOCIATION, a corporation; PRODUCERS TOBACCO COMPANY, INCORPORATED; W. TOWNES LEA and LOUIS W. LOVE, partners, trading as Piedmont Warehouse and Hughes Warehouse; NEALS WAREHOUSES, INC., Jack L. Neal and George A. Myers, Jr., T/A Growers Warehouse; and LATANE MOTLEY and BLAIR MOTLEY, JR., and JOHN W. MOTLEY, Executors of the Estate of Blair Motley, Deceased, T/A Motley's Warehouse, and DANVILLE WAREHOUSE COMPANY, INCORPORATED,
Appellees,

versus

BRYANT-BUCKNER ASSOCIATES, INC.
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.
TED DALTON, CHIEF DISTRICT JUDGE.

(Argued October 31, 1966. Decided January 25, 1967.)

Before BRYAN, BELL and WINTER, Circuit Judges.

I. Murchison Biggs (Robert F. Ward on brief) for Appellant, and Edwin B. Meade (Meade, Tate and Meade on brief) for Appellees The Danville Tobacco Association and Danville Warehouse Company, Incorporated; C. Stuart Wheatley (John W. Carter; Clement, Wheatley, Winston & Craig, and Carter and Carter on brief) for Appellees W. Townes Lea, et al.; John W. Carter (C. Stuart Wheatley; Clement, Wheatley, Winston & Craig, and Carter and Carter on brief) for Appellees Neal's Warehouses, Incorporated et al.; and G. Kenneth Miller (Allan Garrett; Earle Garrett, III; Garrett, Garrett and Smith, and May, Garrett, Miller, Newman & Compton on brief) for Appellees Producers Tobacco Company, Incorporated.

ALBERT V. BRYAN, Circuit Judge:

Apportionment of selling time among the warehousemen on the Danville, Virginia tobacco market, comes here again as an alleged affront to the Sherman Antitrust Act.[1] It is a second appeal in the original suit with which we dealt in Danville Tobacco Association v. Bryant-Buckner Associates, Inc., 333 F2d 202 (1964).

In accordance with our suggestion on remand, the District Court asked the Federal Trade Commission to advise it upon the validity of an apportionment system known as the "permanent plan" and approved by the District Court for use beginning with the 1963 season, or to prescribe an appropriate scheme if the permanent plan were found objectionable. In our opinion in 1964 we approved, as a transitory measure, an interim plan approved by the District Court for 1962 which gave defendant-warehouseman Bryant-Buckner Associates (B-B) a diminished selling-time as a new entrant (in 1962) into the market.

---

[1] 15 USC § 1 et seq.

This interim plan was incorporated into the permanent plan, which we permitted to operate pro tempore pending the report of the Commission. In its response, the Commission found the permanent plan less than "reasonable, fair and equitable", and devised a wholly new formula.

However, the District Court rejected the Commission's scheme and declared the permanent plan to "constitute a proper and legal manner of allocating selling time both as to the warehousemen now on the Danville market and as to a new entrant". B-B now appeals from this ruling. We affirm.

The knot of this controversy is the validity of the constriction placed upon the share allotable to a new warehouseman in the total daily selling time of the market. These restraints were written into the regulations of the Danville Tobacco Association, a membership, non-profit corporation created by the Virginia legislature "for the purpose of . . . regulating the sale of leaf tobacco and trade" in Danville. All of the company buyers and warehousemen, including B-B, are members. The "selling time" of a warehouse is its portion of the total tobacco—here 8800 baskets—that may be sold each day on the market. The rules of the Bright Belt Warehouse Association[2] and the Danville Tobacco Association stipulate that the daily sale period cannot exceed 5½ hours, and must proceed at a rate of not more than 400 baskets per hour for each of the four buying teams.

This suit was commenced by the Association immediately after the admission of B-B to membership in February 1962. Naming all warehouse members as defendants, it sought a declaratory judgment upon the legality under the antitrust

---

[2] For a description of the marketing of bright leaf tobacco generally, and specifically of the operation of the Danville market, see Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F. 2d 202, 204 (4 Cir. 1964) and citations therein. See, also Eagles v. Harriss Sales Corporation, 368 F. 2d 927 (1966).

laws of an initial plan, and when it was condemned, the permanent plan was submitted by the Association for a like ruling. Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F2d 202, 209.

The permanent plan purports, in brief, to allocate selling time on the basis of the proportion of the floor space in each warehouse to the total floor space on the market. Any member is entitled to increase its allotment upon showing that its sales for the previous year exceeded its allotment. A gain or loss, however, cannot go beyond 8% of a preceding year's allotment. In addition, special limitations are placed upon new entrants, that is those joining after 1962.

In the District Court's decree now on review, the permanent plan is set forth in full, the now-pertinent parts of it reading:

> "8. *The Modified Experience System and Adjustments To Be Made as a Result of Fair Competition*
>
> "1. A warehouse unit on and in the Danville Market is identified as a building which is suitable in every respect for selling leaf tobacco at auction in an efficient manner, and which is available therefor, and which is in compliance with the requirements of the Danville Tobacco Association Rules and Regulations relating to the construction and maintenance of tobacco sales warehouses. Provided that the requirement as to 'available therefor' shall be satisfied if it is determined, on the day when the allocation of selling time is made for an approaching season, that the warehouse is available for that season; and provided, further, that the requirements as to 'available' shall not apply to any warehouse which, on September 10, 1962, was under an uncancellable lease, until said lease shall have expired. Each warehouse area measuring 87,500 square feet shall be considered a unit and any proportionate part thereof shall be considered that percentage of a unit. At the time of the opening of the 1962 Danville

Market there were on the market 21 such units. (This includes three units for Bryant-Buckner . . . .)

2. Original selling time is that which existed for each tobacco warehouse on the opening date of the 1962 Danville Market.

"3. Selling time for the 1963 season shall be the same as that for the 1962 season, subject only to such adjustments as may become necessary by reason of the admission of new warehouses, additions to existing warehouses, withdrawals, transfers, leases and mergers, as hereafter provided in these rules and regulations. Beginning with the year 1963 adjustments of selling time for competitive gains or losses shall be made at the end of the 1963 season so as to reflect the valid and credible experience of each warehouse to which selling time was allocated in 1963, such adjustment to be made on the basis of producers sales in pounds plus bona fide resales. . . . No warehouse shall gain or lose, at the end of the season, more than 8% of the selling time which it had during that season. . . . . Similar adjustments shall be made at the end of each season thereafter.

. . . . . .

"8B. *The Admission of New Warehouses and Additions to Existing Warehouses*

"1. A 'new unit' is a warehouse constructed after the market opening of 1962, containing 87,500 square feet of floor space available and suitable for warehouse operations as defined above, whose owners and operators shall be independent of the ownership and operations of any other warehouse facilities on the Danville Market. . . .

"2. An 'added unit' is warehouse space of 87,500 square feet suitable and available for warehouse operations in Danville, either an addition to an exist-

ing warehouse or a new structure, which does not qualify as a 'new unit' as defined above.

"3. 'New units' and 'added units' and fractional parts thereof entering the Danville Market in 1963 shall receive allocation of selling time as follows:

"3a. Prior to the second Tuesday in March, 1963, there shall be computed the number of 'new units' of 87,500 square feet and the number of 'added units' of 87,500 square feet (provided that new construction or added construction of less than 87,500 square feet shall be treated as a fractional unit), and to the sum of those units there shall be added the number of units remaining from the 1962 season. The total available selling time shall then be divided by the total number of units. The result is a 'unit selling time.'

"3b. To each 'new unit' there shall be allocated, for the 1963 season, selling time equal to 75% of the unit selling time.

"3c. As 'added units' are built, either new buildings, additional floor space in new units, or additions to existing buildings, the computation of additional selling time for such 'added units' shall be made after giving full consideration to the units of floor space to which the 'added units' attach, or with which they unite in common ownership or operation . . ., and the computation of additional selling time for such 'added units' shall be made as follows:

"(1) For 87,500 square feet of available warehouse space added to a new or to an existing unit of 87,500 square feet, there shall be allocated 50% of a unit selling time.

"(2) For each 87,500 square feet of warehouse floor space added to 175,000 square feet or more of warehouse floor space under common owner-

ship or management . . ., there shall be allocated 25% of a unit selling time.

"4. For each year following the year 1963, the allocation of selling time to new and added units and the handling of withdrawn units shall follow the rules above prescribed for such handling in the 1963 season.

"5. Whenever it becomes necessary to provide selling time (as reflected by baskets) to a new or an added unit, such selling time shall be taken from existing warehouses in proportion to their selling time."[3]

In the effectuation of this pattern a newcomer is first assigned its share under the plan, and the remaining selling time is then distributed among the older warehouses pro rata—in the proportion of the prior year's holding of each of them.

For its own plan the Commission used 87,500 square feet —the average size of the warehouses—as a space-unit measurement for the allocations and 8% as the gain or loss limitation. However, it thought the restriction of a new member to less selling time per space-unit than that allowed the older warehouses was inimical to the antitrust statutes, as constituting an unlawful restraint upon an outsider.

The plan put forward by the Commission placed a new warehouse upon an equality with the older warehouses in the allocation of selling-time. It would grant each warehouse, new and old alike, one credit-unit (a selling-time unit) for the first 87,500 square feet of floor space. For the next 87,500, each would receive a credit of 75% of a

[3] On the special master's later recommendations, reflecting his awareness that the warehousemen had entered the 1962 season unaware that their performance could alter their subsequent allotments, the implementation of the experience adjustment system was delayed until 1964 in order that its first allotment adjustments would reflect 1963 sales statistics.

unit. For the third 87,500 a credit of 50% would be given, and for a fourth a credit of 25%. The total available baskets—8800—would then be apportioned among the warehouses in the proportion that the total credit-units of each warehouse bore to the aggregate of such units on the market.

I. Before considering the District Court's discard of the Commission's plan, we turn to B-B's attack upon the Court's final approval of the permanent plan as embodying a fair and reasonable pattern for allotment of selling time to a new entrant. Throughout this discussion it must be recalled that B-B's allotment was initially fixed by the interim plan employed for 1962, and that it was taken into the permanent plan as it became effective in 1963.

Because of this origin, B-B's allocation was never subjected to the 75% reduction on its initial 87,500 as required by the permanent plan. B-B was accorded much more. In its application for membership in February 1962 B-B first stated it would build 420,000 square feet, then it said 500,000, and then 268,792, of storage space. Actually it built 168,000. Nevertheless, in the interim plan, *and ever since,* the Association has allowed it selling-units for 268,792. The first unit of 87,529 square feet [4] received full credit. To the remainder of the 268,792, the declining gradations of selling-units were applied, that is 50% to the second 87,529 and 25% to the balance. Although, obviously, there was no balance, B-B was still allowed credit for it.

The baskets allocable per space-unit on the market were 419, and on the Association's reckoning, B-B received 724 baskets. If its warehouse had been allowed 100% on each space-unit, as B-B now asks, it would have received, it

[4] The then stipulated space-unit was 87,529 square feet. 333 F. 2d at 206. As noted herein, the figure has been rounded off to 87,500.

avers, about 851 baskets—its reduction, thus, was 127 baskets or 15% below the norm of the established warehouses.[5] This decrease we found on the first appeal had not been proved to be an unfair restraint. Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F2d. 202, 206, 208. The reasons for this holding are more fully expounded later herein, and on those grounds we adhere to our prior conclusion.

All assignments made in 1962, including B-B's and after distribution of the remaining time among the other warehouses, have since been continued in force pending a final adjudication upon the permanent plan. Thus it incorporates the 1962 allocations as a starting point. Actually, then, B-B has not so far been injured by the reductions stipulated in the permanent plan. On the other hand, it has been made eligible for the 8% gain-or-loss limitation of the permanent plan, not an original attribute of the interim plan.

B-B's apprehension as to the permanent plan appears to be premature and presently academic. However, as a member, B-B may have a right to contest the District Court's declaratory judgment upholding the permanent plan as a regulation of the Association enforceable upon future applicants. For this reason and to avoid any chance of incompleteness in our adjudication, as well as for comparison of the prevailing plan with the F.T.C.'s suggested plan, we undertake a discussion of the permanent plan.

Prior to and during World War Second, there was no surplus of storage space, and selling opportunities were shared by the warehouses by agreement or by employment of the floor-space method. After the war as building materials became accessible, the possibility of wasteful erection of additional warehouses created a problem in distributing selling time. The floor-space system was then

---

[5] For the computation see 333 F. 2d at 208.

in vogue at Danville and continued undisturbed until B-B in 1962 sought to enter the market with an extensive warehouse.

Restrictions on the selling time of newcomers in a tobacco market of the kind applied to B-B in 1962 and provided in the permanent plan are not necessarily unlawful abatements. The evidence demonstrates that the confinement of a latecomer to less-than-average selling-units is necessary in order to maintain the integrity of the market, an institution quite generally recognized as an essential in the production and sale of tobacco. Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F2d 502, 505 (4 Cir. 1959) reheard 294 F2d 619 (4 Cir. 1961). It is for this reason that the courts have sustained the power of a board of trade, such as the Association here, to regulate the disposal of selling time. Indeed, the vendition is held affected with a public interest and the Association is in some aspects almost a State agency. Cf. Asheville Tobacco Board of Trade, Inc. v. F.T.C., supra, 263 F2d 502, 507, 509.

Incidentally, because the quantity of tobacco salable each day has a fixed and constant maximum, its disposition presents an economic situation unfamiliar to those dealing in commodities less limited in supply. For this reason, auction under regulations has been considered the fairest means of sale for the producers, the buyers (the companies who furnish the teams of bidders) and the public. Cf. Rogers v. Douglas Tobacco Board of Trade, 244 F2d 471, 476 (5 Cir. 1957).

Without some circumscription upon the appearance of new, and the enlargement of existing warehouses, competition could be destroyed, and the market monopolized, contrary to antitrust policy by the warehouseman who was able to outbuild the others. Furthermore, unrestrained multiplication or expansion could so water down the business as to render it unprofitable and the market useless to the public. Even threats to overbuild could become an

item of trade. Healthy discouragement of surplus building, it has been found, may be achieved to a degree by fairly withholding full participation in the market from a stranger until he proves he is not gambling.

Any such association, therefore, has to endeavor to find the delicate balance between building-control and unfair restraint of competition. To assist in preventing the latter abuse, a gain-or-loss provision is frequently included, as in the permanent plan, in the regulations. It permits a new competitor to increase its selling time from year to year. At the same time it safeguards a warehouseman against an unjust loss of standing as the result of crop failures and like infelicitous contingencies. Naturally, this factor has frequently been in litigation, on the charge of unduly impeding a new arrival's attaining an equality with his predecessors. Nevertheless it has been upheld when it is seen to be reasonable in the circumstances. See Rogers v. Douglas Tobacco Board of Trade, 266 F2d 636 (5 Cir. 1959); Ashville Tobacco Board of Trade, Inc. v. F.T.C., supra, 263 F2d 502, 510-11, and as reheard 294 F2d 619, 625.

Instantly, the 8% gain-or-loss rate, while not expressly approved for use in the permanent plan, is not disfavored by the Commission if the initial allocation is not unreasonable. The percentage has been found by the master and the District Court to permit a fair augmentation of selling time. Likewise, neither finds unreasonableness in the 25% reduction of credit-units given a new entrant. In this, of course, the judge impliedly approves the 15% reduction of B-B under the terms of its 1962 admission to the Association. These ascertainments we cannot say are faulty.

II. B-B's foremost protestation, evidently, is the District Judge's refusal to replace the Danville system with the Commission's. The latter would give B-B, whether or not a new entrant, 975.85 baskets—an increase of 251 above its quota of 724—while decreasing by 251 the share of the oldest warehouse at Danville. We see no error in the Court's action.

To start with, the Commission's plan does not discourage superfluous buildings. Rather it invites new structures of first-unit size, because floorage of that quantity would receive an undiminished allotment equivalent to the first stage of each of the existing warehouses. Again, there is no absolute legal right in a new entrant to have a prevailing system remolded or discarded for a new model. The duty of a board of trade is to avoid or alleviate unfair restraint sufferable by a new or added warehouse. If this concern is relieved, then there is no just grievance. Presently, this aim has been achieved without a wholesale reshuffling or new dealing of the selling time.

The plan advanced by the Commission seems logical and acceptable enough for a market just opening, but caution should be used in uprooting an established and working system and recasting it in another form, especially one which goes beyond the limits of this controversy. Attempt at a wrenching reformation was thought by the District Court to be particularly and unwarrantably disruptive at Danville. During the years, the warehouses there have made adjustments in the distribution of selling time to absorb any floorage demand as it arose. They did so, to repeat, as late as 1962 to accommodate the entry of B-B. To inaugurate another system would mean the dissolution of reconcilements which have been found necessary and practicable from year to year. Sweeping innovations, unless indispensable, could force the parties to revive old irritations. Doubtlessly, too, myriad unforeseeable contentions could develop. A general rearrangement could also penalize warehousemen who had not contributed to overbuilding. These conclusions of the District Judge cannot be cast aside lightly, for there is wisdom in them.

In this consideration, it must be remembered that the Danville warehouse situation of today is the eventuation of an historical progression. It was not conceived deliberately or at one time; nor was it structured to exclude newcomers. It "just grew" into its present shape and state. The con-

ception of a new start puts theory above actuality. With the District Judge, we think it too speculative in success to be posted as the antitrust standard the Association must meet. Nor is it the province of a Federal court to divine and adjudicate hypotheses.

III. Unreasonable restraint of trade is also charged by B-B because, in assigning selling time figured on floorage, the computer counted space in the older warehouses which was not used for the sale of tobacco. The factual premise is indisputably true. The area required per basket is variously estimated from 20 to 40 sq. ft. Even at 50 sq. ft., only about 440,000 would be needed for the entire 8800-basket quota. In contrast, there are now more than 1,700,000 sq. ft.

Although this enormous excess is not utilized in the vendue of tobacco, it is needed to some extent for storage pending sale or resale. Concededly, some of the area is let out for purposes foreign to tobacco sales. Nevertheless, as the regulations of the Association already quoted will confirm, no floorage credit is given to any part of a warehouse which is not in truth readied or readiable for the sale of tobacco during the season.

B-B can hardly be heard to complain on the score of superfluous space, for it stands in pari delicto in the vice. Its allotment, apparently less than 800 baskets, could well be taken care of within 40,000 sq. ft., yet it has a warehouse of more than 168,000 sq. ft. and, to repeat, was granted selling time on a floorage of more than 268,000.

The Commission decried the superfluity of space generally, and recommended that it be remedied by Association regulations. In outlining its plan, the Commission used all the space now on the market. Although this is not to be taken as its approval, it does show that the Commission recognized that the problem must be resolved practically and within the facts of the Danville market. The Commission said:

> "It is our opinion therefore that, as a general proposition, any proper standard for the control of surplus space, i.e., selling time, on these markets should envision equality of treatment among all members of the market, present and future under whatever system each respective board of trade elects to adopt. Each such system moreover should countenance only the use of space which is in fact 'suitable and available'. This can best be dealt with by way of appropriate definition in the bylaws or other appropriate media."

This view prevailed, too, in the District Court. The present regulations do agree with the Commission's standard of a "suitable and available" warehouse. The permanent plan was accepted by the District Judge, we assume, upon the condition that the appropriation of warehouse space will be rigidly supervised and enforced by the Association.

In the circumstances we cannot declare the District Court in error for not sustaining B-B's indictment of the space excess as an antitrust evil.

IV. Lastly, B-B alleges it was denied an opportunity to show the Board its gain in the selling season of 1964, so as to obtain a larger allotment for 1965. The record does not sustain this grievance; on the contrary it indicates that ample opportunity was afforded B-B for the purpose. The failure to procure the allowance was due to no fault of the Association or the District Court.

The declarations and adjudications of the decree now on review will not be modified. In conclusion we observe, nevertheless, that the permanent plan is certainly not the ideal, nor do we hold it up as a criterion of reasonableness in all circumstances. We do not have the competence, as we pointed out on the first appeal, to construct plans. Our duty, as here, is simply to examine an existing plan and ascertain whether the legal infirmities imputed to it in truth exist.

Affirmed.

APPENDIX C

JUDGMENTS BELOW

(1) Judgment on First Appeal (No. 9136)

[Caption Omitted]

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the said District Court appealed from, in this cause, be, and the same are hereby, affirmed in regard to the 1962-1963 selling season; that the order in reference to the selling season of 1964 and subsequently is suspended; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Danville, for proceedings consistent with the opinion of the Court filed herein; and that the costs on appeal be borne by the appellants.

/s/ SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

/s/ CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

/s/ ALBERT V. BRYAN
United States Circuit Judge.

FILED
May 14 1964
MAURICE S. DEAN
Clerk

(2) Judgment on Second Appeal (No. 10579)

[Caption Omitted]

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

/s/ ALBERT V. BRYAN
United States Circuit Judge.

FILED
Jan 25 1967
MAURICE S. DEAN
Clerk